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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

JOINT CASE MANAGEMENT CONFERENCE STATEMENT

Date: June 4, 2012
Time: 2:30 p.m.
Courtroom: 8, 4th Floor
Judge: The Honorable Lucy H. Koh

The parties submit this joint statement for the June 4, 2012 Case Management Conference.

I. Case Progress

Since the April 18, 2012 Case Management Conference, the case has progressed as follows.

The Court granted in part and denied in part Defendants' Joint Motion to Dismiss and denied Lucasfilm Ltd.'s motion to dismiss. (Dkt. No. 119.) The Court denied Defendants' Joint Motion to Dismiss regarding Plaintiffs' claim under Section 1 of the Sherman Act and Plaintiffs' claim under the Cartwright Act. The Court granted Defendants' Joint Motion to Dismiss regarding Plaintiffs' claim under the Unfair Competition Law.

Plaintiffs confirmed they will not amend the Consolidated Amended Complaint.

On May 1, 2012, at Defendants' request, Plaintiffs agreed to extend Defendants' deadline to answer the Consolidated Amended Complaint to May 21. (Dkt. No. 123.)

On May 17, 2012, Plaintiffs asked Defendants to agree to extend Plaintiffs' deadline to file their class certification motion by four months, to October 26, 2012. On May 21, Defendants refused to agree to the extension.

On May 21, Defendants filed answers. (Dkt. Nos. 126-132.)

On May 25, 2012, Plaintiffs filed a motion for extension of time to file their class certification motion. (Dkt. No. 137.) The Court denied the motion on May 29, 2012. (Dkt. No. 140.)

II. Case Management

A. Class Certification Deadline

1. Plaintiffs' Position[1]

On May 25, 2012, Plaintiffs moved the Court to extend the time to file their motion for class certification from June 28, 2012 to October 26, 2012. (Dkt. No. 137.) As of the date, it had become clear that Defendants' production of data from their human resources, recruiting, and other databases was massive, delayed, and incomplete.

A continuance is necessary to provide Defendants the opportunity to complete production of data and other discovery and to provide Plaintiffs the ability to analyze Defendants' data, review Defendants' document productions, and take other discovery (such as depositions of data custodians and other knowledgeable witnesses) that Plaintiffs will use to support their motion for class certification. In connection with class certification, additional time will be important to refine the class definition, determine the number of class members, compile necessary common evidence that is capable of showing widespread impact (in the form of artificial suppression of compensation) on members of the class, and build a model capable of computing aggregate damages to the class with predominantly class-wide evidence. *See*, *e.g.*, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *24-25 (N.D. Cal. June 5, 2006) ("Plaintiffs need only advance a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis.").

On May 29, 2012, the Court denied Plaintiffs' motion, finding that "Plaintiffs have failed to show good cause for a four-month extension on the deadline to file their class certification

[1] Below, Defendants assert that Plaintiffs did not provide them with a draft of this statement until shortly before the filing deadline. This is incorrect. Plaintiffs provided Defendants with a draft of the case management statement on May 21, 2012. Defendants never responded. After the Court moved the case management conference to June 4, the first draft exchanged by the parties was a draft Defendants provided Plaintiffs at 3:19 p.m. on May 31. At the opening of business today, Plaintiffs' counsel called Defendants' counsel to provide an outline and a detailed summary of the additional points Plaintiffs intended to make to the statement, so that Defendants could respond if they chose to. Plaintiffs confirmed their phone call of earlier today with a completed section to Defendants at 11:27 a.m. today. Defendants did not provide any of their responsive sections until 12:50 p.m., despite receiving advance notice of the points Plaintiffs intended to make.

motion." (Dkt. No. 140.) The Court also scheduled a case management conference for June 4, 2012 at 2:30 p.m.

Plaintiffs respectfully reiterate their request for an extension of the class certification deadline and request argument on the issue at the June 4 case management conference.

Since Plaintiffs filed their motion on May 25, Defendants continue to produce data and documents directly relevant to class certification on a rolling basis.[2] Adobe produced additional documents on May 25 and produced additional data on May 30. Intel produced additional May 25. Intuit produced additional documents on May 25 and May 30. On May 31, Lucasfilm's counsel wrote to say that it will produce additional data that it omitted from earlier productions that include recruiting data covering the years 2001 through 2008. Plaintiffs received that production this morning. Also this morning, Intuit's counsel wrote to say that it will produce additional data.

When Plaintiffs filed their motion on May 25, Defendants had produced 248 different databases with nearly 20 million separate observations (employment history events). Now, a week later, Defendants have produced at least another 118 databases with at least another 17 million separate observations.[3] That is, Plaintiffs' expert received more than 46% of the total observations after Plaintiffs field their motion to extend time. Defendants have now produced over 7 gigabytes of data, with more on the way.

This is an enormous amount of raw data by any measure. This data, from several different companies spanning many years and multiple different computer systems, is not self-explanatory. Plaintiffs and their expert must understand this data for their class certification motion in order to evaluate, *inter alia*, the appropriate economic model or models to employ to assess the effect of

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[2] In Plaintiffs' motion for an extension of time, Plaintiffs mistakenly stated that Defendants have not begun production of "Track Two" documents. Certain Defendants began producing Track Two documents prior to Plaintiffs' motion for extension of time. No Defendant has stated that its document production is complete, and no Defendant has provided an estimate of when its document production will be complete, except to say that they expect to meet the June 15, 2012 substantial completion deadline.

[3] Plaintiffs' expert has not yet uploaded all of Defendants' recent data productions. These totals therefore understate the size of the recent productions. Defendants continue to produce data, as recently as another production that Lucasfilm produced today.

Defendants' illegal agreements on compensation generally, the scope of the affected category or categories of employees (in order to appropriately define the class), and a reliable methodology for quantifying the aggregate effects on compensation caused by Defendants' illegal agreements.

To that end, at Plaintiffs' initiative, the parties have met and conferred several times regarding data issues, and the parties have exchanged numerous correspondence. Apple has not responded to Plaintiffs' initial set of questions, and Plaintiffs are waiting for responses from Google, Intel, Intuit, and Pixar regarding important follow-up questions. There are many outstanding data issues. Intuit's data is missing hiring and recruiting data for 2007 through 2012, and Lucasfilm produced today data regarding hiring and recruiting for 2001 through 2008. Other Defendants continue to omit data they have agreed to produce.[4]

Plaintiffs asked whether Defendants would provide knowledgeable witnesses to discuss data issues on an informal basis. All Defendants refused, requiring Plaintiffs to bear the costs and the delay of formal discovery on matters that are routinely handled expeditiously through informal information exchanges. Plaintiffs then noticed 30(b)(6) depositions regarding data issues, one for each Defendant, on May 24. Plaintiffs have followed-up to schedule the depositions. Thus far, only one Defendant has offered a date for a deposition: Pixar for June 14. Other Defendants have not. Google said it will not be in a position to discuss dates until June 5. Other Defendants have not provided dates.

Once Defendants complete their data and document productions on approximately June 15, the current schedule requires Plaintiffs to move for class certification less than two weeks later, on June 28. Plaintiffs seek more time for preparation of the motion and accompanying expert report.

[4] For instance, Apple has failed to produce overtime compensation data; Adobe has failed to produce stock options data and overtime compensation data; Google has failed to produce stock options data, overtime compensation data, and employee status change data; Intel has failed to produce overtime compensation data and employee status change data; Lucasfilm's data is inconsistent from 2001 through 2005, and is missing bonus information for 2006 through 2012; and Pixar has failed to produce overtime compensation data and employee classification information.

Plaintiffs request additional time to perform the following specific tasks. Some of these tasks will be done in parallel, and some will be done in sequence:

- ***Creating a reliable and substantially complete database (approximately 5 weeks).*** After Defendants produce data, Plaintiffs' expert must clean and vet the data for gaps, reliability, and clarification of data fields. This initial analysis requires approximately four weeks, and has largely been completed for the data already produced. After the initial review, Plaintiffs asked questions of Defendants and asked, as appropriate, for supplemental productions. This process is ongoing, requiring 30(b)(6) depositions after Defendants refused to permit informal conversations with knowledgeable employees. With one exception (Pixar) these depositions have not been scheduled. If the parties act promptly, these depositions and supplemental productions should be completed within the next three weeks. After resolving data questions and completing supplemental productions, Plaintiffs' request an additional two weeks to clean and vet the supplemental data productions.

- ***Reviewing documents and taking depositions (approximately 8 weeks).*** In parallel with preparing the database, Plaintiffs must review Defendants' documents. While the merits are not directly at issue in the class motion, Plaintiffs must evaluate internal company documents regarding the intent and effect of the illegal agreements in order to define the scope of the affected employees (and thus the appropriate class definition or definitions) as well as to assist their economist in putting the enormous amount of compensation and other data in context. The document productions are ongoing and incomplete. In addition to the DOJ productions, Defendants have produced tens of thousands of documents, with more produced daily. These productions indicate that the vast majority of the responsive documents have not been produced, and likely will not be until the Court's June 15 deadline. For example, Apple has only produced approximately 162 documents since its DOJ production. Defendants have not estimated what the size of the eventual production will be, but cases of this kind typically result in hundreds of thousands, if not millions, of documents produced. Thus, Defendants' document productions are likely only a small fraction of the documents Defendants will eventually produce. Once these productions are complete, Plaintiffs request 8 weeks to review the documents and take certain depositions relevant to class certification questions, such as depositions of Defendants' employees responsible for company-wide compensation practices. Plaintiffs also request time for their expert to review documents and deposition testimony.

- ***Data and document analysis (approximately 4 weeks).*** After Plaintiffs' expert constructs a master dataset and understands the meaning of the various data fields, Plaintiffs request an additional four weeks for their expert to analyze the data regarding class certification issues, such as the class definition, the number of class members, and the appropriate means of modeling and proving impact and damages with predominantly class-wide evidence. During this time, Plaintiffs' expert will also review and analyze the documents.

- ***Modeling (approximately 4 weeks).*** After data and document analysis, Plaintiffs request four weeks for their expert to create models for impact analysis. These models are necessary to demonstrate how the expert intends to use class-wide evidence to prove impact and damages—*i.e.*, to show that the Defendants' illegal agreements suppressed compensation and by how much—to members of the class.

- ***Writing the report (approximately 4 weeks).*** After completing models for impact analysis, the results of the expert work must be explained and summarized in a report that Plaintiffs will file with their class certification motion. The report will include economic and statistical analysis. Plaintiffs request four weeks for this task.

In sum, in the first two months, Plaintiffs' counsel and Plaintiffs' expert will create a reliable and substantially complete database, review documents, and take depositions. In the second month, Plaintiffs' counsel and Plaintiffs' expert will analyze the data, documents, and deposition testimony. In the third month, Plaintiffs' expert will create economic models for impact analysis. Finally, in the fourth month, Plaintiffs' expert will write a report that will summarize the economic and statistical analysis.

Defendants understand Plaintiffs' burden as well as the incomplete state of data and document discovery. Defendants appear to be opposing Plaintiffs' request for an extension for strategic reasons. Defendants' refusal to agree to an extension is out of character with the numerous extensions they have requested of Plaintiffs, and to which Plaintiffs have agreed. These extensions include three stipulations in which Plaintiffs, at Defendants' request, agreed to provide Defendants over five months (from service of the first complaint on May 4, 2011 to the date of service of motions to dismiss on October 13, 2011) to respond to the complaints. (Dkt. Nos. 17, 48, 63.) Plaintiffs have also agreed to extend Defendants' deadline to file answers (Dkt. No. 123), and have agreed to provide Defendants with additional time to respond to Plaintiffs' discovery requests.

Plaintiffs respectfully reiterate their request for an extension to the class certification deadline, running four months from completion of the data and document production. Plaintiffs respectfully request the opportunity to discuss the matter at the case management conference.

1. <u>Defendants' Position</u>

Defendants received Plaintiffs' Position – essentially an unauthorized motion for reconsideration – including a variety of new claims about supposed discovery issues, 35 minutes

before the deadline for filing this statement.[5] Defendants request an opportunity to more fully address Plaintiffs' assertions, to the extent necessary, at the conference.

Plaintiffs' further request for a four-month continuance to file their class certification motion — particularly after the Court has denied their motion for extension of time — is nothing if not bold. A month ago, Plaintiffs appeared before this Court and sought no change to the class certification schedule or any other part of the Court's scheduling order, and raised no dispute about the content or timing of Defendants' data and document productions. At that time, Plaintiffs knew exactly what data and documents Defendants had produced, and would be producing, because the parties had spent significant time hashing out the parameters for those productions. At Plaintiffs' insistence, in line with their refusal to narrow their class definition, Defendants agreed to produce eleven years' worth of compensation data for every one of their tens of thousands of salaried employees in the U.S., with multiple data fields for each employee, as well as extensive recruiting data.

Defendants expended significant time and resources producing that data according to the Court's schedule. The data productions began almost two months ago and, with minimal exceptions, they are complete. Since at least early May, Plaintiffs have had voluminous data to undertake the required analysis for class certification. However, from Plaintiffs' Position it appears that, rather than working with their experts to develop an analytical model and analyze the data, Plaintiffs instead have spent the past weeks trying to find flaws in the data to support their request for an extension. That effort is misguided. There has been no delay or meaningful "gaps" in Defendants' production, and there is no good cause to grant plaintiffs' requested extension.

[5] The Court issued an order on May 29, directing the parties to file a Joint Case Management Conference Statement by noon on June 1, 2012. Plaintiffs sent no proposed sections to the Case Management Conference Statement until 35 minutes before the deadline for filing. Plaintiffs' reference to draft statements exchanged before the previously-scheduled Case Management Conference set for May 31 is irrelevant, as this version is substantially different. Defendants did not respond to the earlier draft because the Court originally postponed the May 31 Case Management Conference to July 25. Defendants will be prepared to address the issues raised in Plaintiffs' sections in greater detail at the Case Management Conference on June 4.

Plaintiffs have also argued that they cannot file for class certification by June 28 because it is too soon after the June 15 deadline the Court set for Defendants to substantially complete production of additional documents. But the Court set that schedule in October 2011 — seven months ago — and Plaintiffs raised no issues with it between then and filing their motion for extension one week ago. Plaintiffs also ignore that they received approximately 100,000 pages of documents that Defendants produced to the Department of Justice six months ago, and additional rolling productions since. Plaintiffs fail to explain what new evidence they hope to find in the "June 15" documents to support their class certification motion, why they need the new documents to take depositions before class certification when they have otherwise indicated no intention to do so, or why, in any event, they waited until now to complain about the schedule the Court set last October.[6] Plaintiffs have not established the "good cause" necessary to extend the deadline for seeking class certification set forth in the scheduling order, and their request to do so should again be denied.

Plaintiffs Cannot Show the Good Cause Required to Modify the Scheduling Order.

A scheduling order may be modified only for good cause. Fed. R. Civ. P. 16(b)(4). The focus of the good cause standard is on the diligence of the party seeking amendment. "If that party was not diligent, the inquiry should end." *Johnson v. Mammoth Recreations*, 975 F.2d 604, 610 (9th Cir. 1992); *Rashdan v. Geissberger*, 2012 U.S. Dist. LEXIS 21595, *6 (N.D. Cal. 2012) (denying request for five-month extension of scheduling order deadlines where plaintiff had failed to act diligently in pursuing discovery). To demonstrate good cause, Plaintiffs must show that: (1) they were diligent in assisting the Court in creating a workable scheduling order; (2) they are unable to comply with the current schedule because of the development of matters which could not have been reasonably foreseen or anticipated when the schedule was set; and (3) they

[6] It does not seem a coincidence that Plaintiffs' motion comes less than two weeks after the Notices of Appearance of two new Lieff Cabraser partners, which followed shortly after Interim Lead Counsel, Mr. Saveri, announced he was leaving Lieff Cabraser to start another firm. That development itself came only two weeks after the last CMC, where Plaintiffs did not raise it as a basis to upset the schedule. These co-counsel issues are not good cause for this motion.

were diligent in seeking to amend the scheduling order once it became apparent that they could not comply with it. *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999).

Plaintiffs' cannot make that showing. Their claimed inability to comply with the Court's scheduling order has nothing to do with developments that could not have been reasonably foreseen, and even if it did, Plaintiffs have not been diligent in seeking to amend the schedule. Plaintiffs have known about the class certification filing deadline — as well as the trial date and all intermediate dates — for seven months, since the Court entered the scheduling order on October 26, 2011. As recently as the last case management conference on April 18, Plaintiffs did not claim that they would be unable to meet the schedule generally or that the timing of Defendants' data and document productions would prohibit them from filing for class certification on June 28. Instead, Plaintiffs agreed to a deadline of May 9 for Apple to produce responsive data and to begin its rolling production of custodian documents. (Apple met that deadline.) Plaintiffs also raised no objection to the timing of the other Defendants' data and document productions, which were then ongoing. Plaintiffs knew at the April 18 case management conference that their experts would need to analyze the data prior to filing their class certification motion.[7] At no time did Plaintiffs suggest that the timing of the productions would require a change in the class certification motion date, much less an extension of four months.

Plaintiffs Mischaracterize Defendants' Data Productions, Which Are Substantially Complete and Consist of the Data that Plaintiffs Themselves Requested

Plaintiffs' suggestion that the timing of Defendants' data production justifies an extension of time to file the class certification motion is wrong. All Defendants have completed, or substantially completed, their data productions; have made (or will make very soon) supplemental productions to address any imperfections that are inevitable with data productions of this

[7] Now is not the time to address the standards for class certification, but Plaintiffs' statement of the standard is incorrect. Plaintiffs must do more than advance a "plausible methodology." (Mot. at 1.) Instead, they must "affirmatively demonstrate" and "be prepared to prove that there are *in fact* … common questions of law or fact," *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), and that those common questions predominate over individual ones. The Court must, in turn, perform a "rigorous analysis" to ensure that the class certification requirements have been met. *Id.*; *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980-81 (9th Cir. 2011).

magnitude; and have answered, or are working to answer, the voluminous questions that Plaintiffs recently sent to Defendants regarding the data productions. Plaintiffs' assertion that Defendants are withholding responsive data is simply inaccurate; Defendants are producing exactly what the parties agreed upon. And Defendants have met all court-ordered deadlines for producing data:

- ***Adobe.*** Adobe believes that its production of data is complete. On April 10, 2012, Adobe produced its compensation data. On May 5, Plaintiffs informed Adobe that certain stock options data appeared to have been omitted, which Adobe produced on May 25. Adobe has also produced its recruiting and hiring data. Plaintiffs sent Adobe lengthy questions regarding its data. Adobe answered all the questions and met telephonically with plaintiffs' consulting experts about the data.

- ***Apple.*** Apple's data production has been complete since May 9. Apple produced its personnel data, including compensation data, on May 3. Apple produced data regarding employee stock options, along with recruiting data, from its third party databases on May 9. Plaintiffs have asked a number of specific questions regarding certain data fields and values in its productions, and Apple is working diligently to respond to Plaintiffs' questions. Plaintiffs have raised the question of overtime compensation data for the first time in Plaintiffs' Position above.

- ***Google.*** Google began producing employee and recruiting data on April 9, before the last case management conference. Google has continued to produce data, including (1) compensation data, (2) additional information about stock options and bonuses, and (3) details of the results of applications for employment at Google, on May 9 and May 22. Google has also responded to plaintiffs' questions regarding its data productions and will continue to do so. Google does not collect the information plaintiffs have requested regarding individual cold calls, but Google has retrieved information from a now-retired database that includes the collection of information reasonably accessible to Google about potential applicants to Google and Google's contacts or lack of contacts with them. Google produced information from this now-retired database to plaintiffs on May 30. Google has contacted plaintiffs' counsel regarding their notices of 30(b)(6) deposition and offered to confer about those notices on June 5. Google has produced the compensation data (including stock option data) that it has agreed to produce pursuant to the previous meet and confers and its discovery responses.

- ***Intuit.*** Intuit believes that its production of data is complete. Intuit began production of its compensation and recruiting data on April 17, 2012. On May 18, plaintiffs requested certain employee level personnel and compensation data for the years 2010 and 2011 that was inadvertently omitted from Intuit's previous productions. Intuit produced this additional data on May 21, 2012. On June 1, Intuit produced the remaining recruiting data that includes candidate information from approximately 2006 to the present. This data was not produced earlier because it had to be restored by the third-party that maintains the data and some data corruption issues arose in the restoration process. Plaintiffs have sent several sets of questions regarding Inuit's data. Intuit has answered many of the questions and is diligently working to respond to the remaining ones.

- ***Intel.*** Intel's data production is complete and, with very minor exceptions, has been complete since May 9, 2012. Most of it was produced in April. Intel produced all of its responsive recruiting data and nearly all of its responsive personnel data, including

compensation data, on April 16. Intel produced additional compensation data on April 26. On May 9, Intel produced one remaining data field, thus completing its production of compensation data. On May 22, Intel produced data for one field for one year that was inadvertently excluded from its April 16 production. On May 24, Intel produced replacement data for seven data records out of the hundreds of thousands it had produced in April. On May 7, Plaintiffs asked a number of questions regarding the data fields and values contained in Intel's data productions. Intel provided a partial response on May 10, and completed its response on May 23. Intel has told Plaintiffs that it does not maintain data for the fields that Plaintiffs identified as "missing." On May 31, Plaintiffs asked additional questions regarding Intel's data production and requested additional data not previously requested, let alone part of the parties' agreement regarding the data to be produced. Intel is working diligently to review the list and respond to Plaintiffs' questions. Intel will make one or more witnesses available for deposition or interview by June 15.

- ***Lucasfilm.*** Lucasfilm's data production is complete. Lucasfilm produced responsive data from its active HR database on April 16, 2012, and responsive data from its active recruiting database on May 9, 2012. On May 21, 2012, Lucasfilm made a further production including compensation data from 2001-2012, as well as HR data from 2001-2005, which had been extracted from an inactive database. Although Lucasfilm believed this production also included responsive recruiting data from 2001-2008, Lucasfilm discovered on May 30, 2012, that the recruiting data had been unintentionally omitted from the production volume due to a technical error. On May 31, 2012, Lucasfilm produced the remaining recruiting data from 2001-2008, completing its data production. On May 7, 2012, Plaintiffs sent Lucasfilm a series of questions about the data that had been thus far produced. Lucasfilm responded to Plaintiffs' letter on May 12, 2012, attaching an 8-page response to Plaintiffs' specific questions. On May 17, 2012, Plaintiffs sent a follow-up letter stating that they had additional, unspecified questions about Lucasfilm's data production. Although Lucasfilm has repeatedly indicated its willingness to answer any additional questions about the data, Plaintiffs have posed none. Plaintiffs noticed a 30(b)(6) deposition regarding the data productions, and Lucasfilm has begun meeting and conferring with Plaintiffs to set a date for the deposition.

- ***Pixar.*** Pixar completed its production of recruiting and compensation data from its human resources databases on April 18, 2012, with the exception of a few inadvertent gaps. Plaintiffs wrote to Pixar with questions about the data on May 8. Pixar responded with substantive answers on May 17, and on May 23, Pixar produced data to fill the gaps that had been identified. On May 30, Plaintiffs requested additional data from Pixar that was not included in the categories of data the parties agreed should be produced. The parties are continuing to meet and confer about these requests.

Nor can Plaintiffs claim surprise as to the amount or type of data Defendants have produced. Although the Court has urged Plaintiffs to narrow their class definition, Plaintiffs have refused to do so. Instead, they have insisted on receiving many fields of compensation-related data for all of the tens of thousands of Defendants' salaried employees nationwide, not just over a their purported five-year class period, but for an additional four years before and two years after that period. All of this was hashed out over repeated meet-and-confer sessions, and by the time of

the case management conference on April 18, the parties had reached agreement on the data to be produced. Defendants have produced "20 million" data observations because that is what Plaintiffs demanded. In short, Plaintiffs knew exactly what they would be getting, and they cannot point to any unforeseeable circumstances that would justify the extension they now seek.

Defendants' Document Productions Are Proceeding as the Parties Have Agreed and the Court Ordered, and They Provide No Basis for Plaintiffs' Requested Extension.

Plaintiffs' claim that Defendants' non-data document productions somehow justify a four-month extension is also misguided. Defendants have begun producing documents on the two tracks the parties agreed to, and on the schedule the Court ordered. Plaintiffs have never claimed otherwise, to this Court or Judge Lloyd.

On April 9, 2012, Defendants began their rolling production of documents on the "first track," which depends upon custodian interviews, among other efforts, to identify responsive, high-level documents without the need to run search terms against electronically stored information. All Defendants have also begun their rolling production of documents on the "second track," which involves using search terms to search electronically stored information from specific custodians. At Plaintiffs' request, Defendants have agreed both to supplement their Department of Justice document collections by adding custodians and extending the time period and to search the DOJ collections with additional terms. Defendants began their rolling production of documents pursuant to this second track on or before May 9, 2012. Both production tracks are ongoing, and Defendants are working hard to meet, and anticipate meeting, the Court's June 15 deadline.

That these productions are in progress is unsurprising given that the Court's deadline for substantial completion is still two weeks away. This deadline was set in the Court's October 2011 scheduling order, and yet Plaintiffs waited until their motion for an extension to claim that it "will be impossible to review these documents in time for a class certification motion due less than two weeks later," and that it "will also be impossible to take depositions about these documents in time for the motion." (Mot. at 4.) These concerns were entirely foreseeable, and

Plaintiffs offer no excuse for failing to raise them before now. In fact, Plaintiffs' motion is the first time they have mentioned wanting to take depositions before moving for class certification, notwithstanding that they received Defendants' DOJ productions six months ago, and additional productions since. Even now, the only depositions they have sought are the Rule 30(b)(6) depositions relating to Defendants' data productions, which they hurriedly noticed on May 24 after it became clear that Defendants would not agree to extend the class certification schedule. Plaintiffs' suggestion that Defendants' document productions are holding up preparation of their class certification motion is nothing more than an excuse for their own lack of diligence.

Plaintiffs' Proposed Extension is Unwarranted and Unfair.

Plaintiffs' attempt to blame Defendants for their own lack of diligence is unsupported. Defendants have expended enormous time and resources to meet the deadlines that the Court set, and to produce the voluminous data and numerous documents Plaintiffs have demanded. A month ago, Plaintiffs were satisfied with receiving the data and documents pursuant to the Court's schedule, and filing their class certification motion on June 28. There is no legitimate basis for their request now for an additional four months to do the same job.

In particular, it would be fundamentally unfair to Defendants to grant a four-month extension (or any extension for that matter) and leave the remainder of the schedule in place. For example, Plaintiffs' proposal to compress the schedule by collapsing the class and merits phases would prejudice Defendants severely, as the case depends fundamentally on how Plaintiffs define their putative class and how the Court decides class certification. Under Plaintiffs' alternative proposed schedule, Defendants would not know what class, if any, is certified before having to prepare and file expert reports and dispositive motions. There is no good cause for Plaintiffs' untimely and prejudicial request.

III. Discovery

A. Discovery Regarding Plaintiffs

1. Plaintiffs' Summary

Following the previous case management conference, the parties met and conferred regarding the scope of Plaintiffs' responses to Defendants' document requests and interrogatories. The parties reached agreement on the scope of those responses on May 8, 2012. The agreement includes discovery regarding Plaintiffs' employment history from college graduation forward, and for any employment before college graduation that relate to Plaintiffs' qualification in the high-tech industry. Plaintiffs are accordingly collecting documents and information throughout this period, and are in the process of preparing them for production. These documents include personal emails, ESI that Defendants have uniformly refused to collect and produce to Plaintiffs, on the justification that no custodian uses personal email for any responsive purpose.[8] Plaintiffs are also preparing to supplement their interrogatory responses pursuant to the same understanding.

Three days after reaching agreement with Plaintiffs regarding the scope of Plaintiffs' responses (in which Plaintiffs agreed to provide nearly everything Defendants requested), Defendants informed Plaintiffs' counsel that Defendants were serving 14 subpoenas seeking largely duplicative—and irrelevant—information from 14 of Plaintiffs' former employers. Plaintiffs learned of this for the first time at 4:15pm on Friday, May 11 via an email from Defendants' counsel. At no time during any of the parties' numerous in-person and telephonic conferences, pursuant to Rule 26 or otherwise, had Defendants ever raised the issue of subpoenas to Plaintiffs' former or current employers. Later the following week, Plaintiffs learned that Defendants began serving their subpoenas the same day in which they emailed notification to Plaintiffs' counsel. This notice was insufficient under Rule 45 and departed substantially from Plaintiffs' practice of providing Defendants with a week's notice prior to service of subpoenas.

[8] No Defendant has said that it has collected a single personal email from any custodian, even the custodians Defendants assert are "key" to this action, such as Eric Schmidt. Plaintiffs will not be able to test the representations of Defendants' counsel in this regard until Plaintiffs' counsel depose the custodians.

Plaintiffs' counsel thereafter met and conferred with Defendants' counsel in an attempt to eliminate or minimize the burden on the third parties and to satisfy Defendants' discovery requests without the burden to third parties and without the harassment and harm that would result from serving subpoenas on Plaintiffs' employers. Defendants' counsel refused to withdraw the subpoenas, and informed Plaintiffs' counsel that Defendants intended to serve additional subpoenas on all of Plaintiffs' former and current employers, regardless of how far removed from employment with a Defendant.

The third party subpoenas call for material that is overbroad, duplicative, unnecessary, improper, and harassing. The subpoenas are the subject of the pending Discovery Dispute Joint Report #2. (Dkt. No. 141.)

2. Defendants' Summary

On February 17, 2012, Defendants served discovery on the five named plaintiffs seeking information relating to their employment history, compensation, and related matters. In response, Plaintiffs produced documents consisting of the public filings in *United States v. Adobe Systems, Inc.* and *United States v. Lucasfilm Ltd.* and four articles printed from public websites. To this date, Plaintiffs have produced no documents relating to their employment history or compensation.

At the April 18, 2012 Case Management Conference, the Court ordered Plaintiffs to produce the information that Defendants had sought. As the Court put it, "Plaintiffs have to be open books on their work history and whatnot." (Tr. 24:13-14.) The Court specifically ordered Plaintiffs to produce all resumes and performance reviews in their possession. (Tr. 26: 6-8 ("I don't see any good basis to withhold resumes of these plaintiffs. That's the order. Don't waste Judge Lloyd's time."); Tr. 26:23-24 (same regarding performance reviews).) The parties met and conferred following the April 18 CMC, and plaintiffs agreed to supplement their discovery responses and to aim to provide those responses by May 17, 2012. Plaintiffs did not produce documents or further discovery responses by May 17, 2012. On May 22, 2012, plaintiffs indicated that they intended to produce documents by June 15, 2012 and supplemental

interrogatory responses before that. To date, Plaintiffs have produced none of the documents that the Court ordered to be produced, nor any supplemental discovery responses.

Defendants have served subpoenas on certain current and former employers of the named Plaintiffs, seeking documents related to the named Plaintiffs' hiring, qualifications, employment history, and compensation. These subpoenas seek information that is highly relevant to Plaintiffs' claims of under-compensation and their ability to represent the putative class, that these third parties are very likely to have documents not in the possession of the Plaintiffs, and that there is nothing harassing about serving current and former employers of named plaintiffs in a class action in which the named plaintiffs allege they were undercompensated in the workplace.

Plaintiffs' proposal in the meet-and-confer sessions belies any real concerns about privacy. In those sessions, Plaintiffs suggested that Defendants withdraw the subpoenas so that Plaintiffs could ask the subpoena recipients to provide the same documents to Plaintiffs voluntarily. Plaintiffs would then produce the documents to Defendants. Not only is this proposal unworkable, but it shows that Plaintiffs have no actual privacy concerns. Under their proposal, Defendants would get the same documents that it has sought by subpoena. They simply want to insert themselves as a filter or bottleneck between Defendants and Plaintiffs' employers.

Plaintiffs are also incorrect that the notice was insufficient under Rule 45. Defendants' notice to Plaintiffs' counsel complied with the rules for serving subpoenas. In any event, Plaintiffs have now been on notice of the subpoenas for several weeks.

The parties met and conferred and reached an impasse, and subsequently filed a Discovery Dispute Joint Report #2 pursuant to Judge Lloyd's Standing Order on May 29, 2012. (Dkt. 141.)

B. Discovery of Defendants

1. Plaintiffs' Summary

Plaintiffs respectfully refer the Court to the summary of discovery above in Part II.A.1.

2. Defendants' Summary

In November 2011, all Defendants produced to Plaintiffs the documents they had produced to the Department of Justice, as well as correspondence with the DOJ and drafts of the

civil consent decrees that were eventually entered. These productions totaled approximately 100,000 pages. At the same time, Defendants responded to seven requests for production of documents (which related to the DOJ investigation). Aside from the DOJ productions, the Court ordered a stay on discovery until January 26, 2012.

After the Court lifted the stay on discovery on January 26, 2012, Defendants responded to the remaining forty-seven document requests that Plaintiffs had served prior to the stay, as well as five additional requests. Defendants also responded to interrogatories that Plaintiffs served prior to the stay on discovery.

Data Productions. Following meet and confer sessions with Plaintiffs regarding the scope of their data requests, Defendants agreed to produce certain categories of responsive data created between January 1, 2001 and February 1, 2012, relating to employee compensation and recruiting. At the Case Management Conference on April 18, the Court ordered Apple to produce its data by May 9. Apple did so. The other Defendants have produced this data on a rolling basis, and those productions are entirely or substantially complete. Upon receipt of the data productions, Plaintiffs conducted an initial analysis to identify any gaps and questions. Defendants have addressed, or are in the process of addressing, those issues. On May 23, 2012, Plaintiffs sent notices for 30(b)(6) depositions of each Defendant related to their data production. The parties are meeting and conferring with respect to those notices.

Non-Data Productions. Consistent with an agreement with Plaintiffs, Defendants have produced and will continue to produce non-data documents pursuant to two tracks. The first track depends upon custodian interviews, among other efforts, to identify responsive, high-level documents without the need to run search terms against electronically stored information. Defendants began their rolling production of documents pursuant to the first track on April 9, 2012, and these productions are ongoing.

The second track of document production involves ESI collections from custodians using search terms. The parties agreed Defendants would supplement their DOJ collections, and would also search the DOJ collections with additional terms. The supplemental collections consist of

collections with a start date of January 1, 2004 and end dates of December 31, 2011 for "key" custodians and December 31, 2010 for other custodians. Defendants have begun their rolling production of documents pursuant to this second track, and these productions are ongoing. Defendants expect to meet the Court's June 15, 2012 deadline for substantial completion of these document productions.

IV. Status of Interim Lead Counsel

Plaintiffs' counsel anticipate filing an unopposed administrative motion and proposed order to amend Pretrial Order No. 1 to appoint jointly Lieff, Cabraser, Heimann & Bernstein, LLP and Saveri Law Firm as Plaintiffs' interim co-lead counsel.

Dated: June 1, 2012

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ATTESTATION: Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from all signatories.